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No. _____

In The

Supreme Court of the United States

October Term, 1997

ADAN MELENDEZ AND ROSA MELENDEZ,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of the purposes of the Civil Rights Act (42 U.S.C. section 1983), may a state enact legislation which restricts or eliminates liability of its police officers under the Act's "color of law" provision, as California has done here by equating "color of law" with California's more limited definition of "scope of employment"?

2. In light of decisions such as *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S.Ct. 2472, 137 L.Ed.2d 626 (1997), may a municipality's liability for deliberate indifference to the unconstitutional use of excessive force by its police officers include indifference to multiple uses of excessive force by a single officer, whose wrongful shooting of petitioner led to the present action?

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PETITION FOR WRIT OF CERTIORARI

Adan Melendez and Rosa Melendez respectfully petition for issuance of a writ of certiorari to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division Four, filed April 14, 1998 (reported at 63 Cal.App.4th 1, 73 Cal.Rptr.2d 469).

OPINIONS BELOW

On April 14, 1998, the Court of Appeal of the State of California, Second Appellate District, Division Four, issued its opinion reversing a judgment in favor of petitioners Adan Melendez and Rosa Melendez and directing the trial court to enter a new judgment in favor of respondent City of Los Angeles. The Court of Appeal's opinion, in its case No. B104126, is reported at 63 Cal.App.4th 1, 73 Cal.Rptr.2d 469, and is reprinted in the attached Appendix. (App. 1-24.)[1] The Court of Appeal denied a rehearing on May 5, 1998. (App. 25.)

Petitioners sought review in the California Supreme Court on issues including those presented here. By a 6 to 1 vote, the California Supreme Court denied review on June 24, 1998. (App. 26.)

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[1] "App." refers to the attached Appendix. "RT" refers to the Reporter's Transcript on Appeal in the Court of Appeal's case No. B104126. The "RT" citations will first refer to the volume number, followed by a colon, followed by the page or pages, and where appropriate, the line or lines, *e.g.*, "RT 1:100." "Supp.RT" refers to the Supplemental Reporter's Transcript on Appeal in the same case. "AA" refers to the Appellant's Appendix in Lieu of Clerk's Transcript in the same case. References to "Supp. RT" and "AA" will follow the same form as those to "RT."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1257(a).

The California Supreme Court's order denying review was filed on June 24, 1998. This petition is therefore timely presented pursuant to Supreme Court Rules 13.1 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment V, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."[2]

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[2] The provision relating to immunity of judicial officers from injunctive relief was added in 1996 by Pub.L. 104-317, section 309(c), subsequent to the events leading to the present case. Those provisions are irrelevant to the present case.

STATEMENT OF THE CASE

A. The Federal Questions Were Properly Raised.

In October 1990, petitioner Adan Melendez was wrongfully shot in the back and rendered a paraplegic while attempting to obtain a refund for a ticket he had purchased to a dance that had been broken up by police. He was one of many persons seeking refunds at the location where the tickets to the dance had been sold. He was kicked by Los Angeles Police Officer Stephen Oskierko, who had been working off duty as a security guard at the location, then shot in the back by Los Angeles Police Officer Thomas Burris, who had also been working off duty as a security guard at the location. Neither officer had any good cause for his actions.

Under California law, " . . . The authority of . . . [any police officer] extends to any place in the state, as follows: . . . (3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer's presence, and with respect to which there is immediate danger to person or property. . . . " (Cal. Penal Code section 830.1(a).)

A California police officer's power exists while he or she is off duty. (See, *e.g.*, Cal. Penal Code sec. 830.31; *Inouye v. County of Los Angeles*, 30 Cal.App.4th 278, 284, 35 Cal.Rptr.2d 367 (1994) [" . . . In [Cal. Penal Code] section 830.31, the Legislature has clearly empowered safety police officers to make . . . arrests while off duty."])

Melendez and his wife, Rosa, sued Officers Burris and Oskierko and their employer, the City of Los Angeles. The lawsuit included causes of action based upon California law and upon violation of the Civil Rights Act, 42 U.S.C. section 1983. A jury resolved all

factual disputes in favor of petitioners and awarded them substantial damages against the officers and the City, based independently upon the state causes of action and upon section 1983.

B. Factual Summary.

We recite the facts in detail to provide context to the California Court of Appeal's holdings that under its interpretation of California Penal Code section 70(d) respondent City is not liable under the Civil Rights Act, as a matter of law, despite the jury's 12-0 and 11-1 special verdicts finding that the true facts were as presented by petitioners.

1. The Parties.

a. *Los Angeles Police Department ("LAPD") Officer Thomas Burris* was a police officer for the City of Los Angeles for 17 years. (Supp.RT 35-36.) He is 6'1" tall and weighs 260-270 pounds. (RT 1:47.)

On three or four occasions while employed as a Los Angeles Police Officer, Burris worked off duty as a private security guard. He carried an LAPD approved gun with him on each occasion. (Supp.RT 38.) He shot plaintiff Adan Melendez with one of those guns. (Supp.RT 39.) The gun's ammunition was also approved by the LAPD. (Supp.RT 40.) Burris' sole authority to carry a gun was his status as a Los Angeles Police Officer. (Supp.RT 40.)

Burris had the authority to use his police officer powers at any time, whether on or off duty. (Supp.RT 46; Cal. Penal Code section 830.31; *Inouye v. County of Los Angeles, supra,* 30 Cal.App.4th 278, 284, 35 Cal.Rptr.2d 367.)

Burris also carried his badge while off duty and would wear it in a visible place on his belt when he worked as a security guard. (Supp.RT 43.) The LAPD had always approved his off-duty work. (Supp.RT 45-46.)

Prior to October 27, 1990 (the date Burris shot petitioner Melendez), Burris had been the subject of numerous complaints about his use of excessive force and improper tactics. These complaints included the following:

(1) A 1982 complaint for use of excessive force. (AA 2:344-371; RT 1:76.)

(2) A second 1982 complaint for beating an arrestee who was in handcuffs. (AA 3:640-680; RT 1:76.)

(3) A 1983 complaint for use of excessive force. (AA 2:373-400; RT 1:76.) Each of the latter three complaints was "not sustained" by the LAPD. (RT 1:85-88.)[3]

(4) A 1984 complaint involved allegations that Burris pulled a suspect's hair, pushed him into the side of a police car and unnecessarily twisted his arm. (AA 2:408-438; RT 1:93-95.) Burris' commanding officer wrote a "Personnel Complaint" noting a "pattern" of excessive force and improper tactics by Burris. (AA 2:412.) Burris was disciplined by having to work two regular off days without pay. (RT 1:96.)

(5) Another 1984 excessive force complaint included an allegation of false arrest. He was exonerated. (AA 2:439-484; RT 1:96-97.)

(6) A 1987 complaint involved Burris' use of excessive force while working as a private security guard at

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[3] "Not sustained" means the LAPD viewed the evidence as evenly balanced, or the citizen's complaint could not be corroborated by any independent witness. (RT 1:90, 5:999.)

the Greyhound Bus Station. (AA 3:533-586; RT 1:100.) The LAPD viewed this complaint as unfounded. (RT 1:100-101.)

(7) A 1988 complaint for beating a street vendor and kicking him in the groin was "not sustained." (AA 3:587-615; RT 1:101-102.)

(8) On October 16, 1990, 12 days before Burris shot Melendez, several excessive force complaints were lodged against Burris, following an incident at the Greyhound Bus Station while he was again working as a private security guard. (AA 3:616-639; RT 1:102-103, 1:106.) The LAPD sustained the allegation that Burris struck and used a choke hold on a 73-year old man who was smoking in a "No Smoking" area of the station. (AA 3:616-622; RT 1:107.) Burris' commanding officer recommended that Burris be suspended for four days and transferred out of the Central Division. (RT 1:108, 5:993-994.) Later, after the incident in the present case, the decision was reversed by Los Angeles Police Chief Daryl Gates, who found the allegations to be "not sustained," and Burris did not serve any suspension. (RT 1:107-108.)

Burris was never required to undergo additional training or retraining as a result of any of the above complaints, nor was any such requirement imposed after the present incident. (RT 1:102, 1:109.)

b. *Los Angeles Police Officer Stephen Oskierko* had worked in the Central Division with Burris since about 1989. They had never been assigned as partners, but they had worked together on off-duty assignments prior to the present incident. (Supp.RT 46, 48; RT 5:974.) Oskierko is 6' tall and weighs about 175 pounds. (RT 1:47.)

c. *Respondent City of Los Angeles* ("City") is a governmental entity that includes the Los Angeles Police Department. (RT 9:1831-1832.)

d. *Petitioner Adan Melendez* was 20 years old on October 27, 1990. (RT 3:528.) He was about 5'7" tall and weighed 140 to 170 pounds. (RT 2:236, 2:308, 3:533.) He is married to petitioner Rosa Melendez. (RT 3:528.)

2. The "Underground Dance."

The Gala Restaurant was located in an industrial area of Los Angeles and was a popular eating place among police officers assigned to the area. (RT 3:591, 3:613.) On October 27, 1990, the Gala rented its banquet room to Laslo Borzai to use as a location to sell tickets to an after hours dance Borzai was holding nearby. (RT 3:591-593; AA 2:327.) Borzai employed two young women to sell the tickets and, as discussed below, also hired Officers Burris and Oskierko to "protect the money" that was received. (Supp.RT 67-68; RT 3:594; AA 2:327.)

3. Officers Burris And Oskierko Are Hired To Protect The Cash Received From Ticket Sales At The Gala Restaurant.

Burris and Oskierko were hired *only* to protect the cash being collected at the Gala Restaurant. (Supp.RT 67-68.) Burris specifically testified as follows:

> "Q. Now, when you were hired to do this work at the Gala Restaurant, you were hired to protect the money. Isn't that correct?
>
> "A. Yes, sir.
>
> "Q. *And that was your only function as security guard*; correct?
>
> "A. *Yes, sir.*" (Supp.RT 68, lines 15-21; emphasis added.)

The job did not require that the officers carry their weapons. (RT 1:167.) However, each carried his badge and gun to the Gala Restaurant. Burris did this every time he had such a job. (Supp.RT 38, 42.) Each wore his badge on his belt where the badges were in plain view. (RT 43; RT 3:596; RT 7:1327.) Oskierko testified without contradiction that the LAPD encouraged its officers to carry their badges at all times to identify themselves as officers. (RT 7:1322.)

While the tickets were being sold at the door, Burris and Oskierko sat at a table behind the ticket sellers. (Supp.RT 85-87.) On three occasions, Burris or Oskierko accompanied a courier, with cash proceeds that had accumulated, from the restaurant to the courier's car. (Supp.RT 69-71.) During this time, both Burris and Oskierko drank beer. (Supp.RT 71-74, 79; RT 3:574-576.) Subsequent breathalizer tests showed that when Burris shot Melendez, Burris had a blood alcohol content of .08 to .13 and Oskierko had a blood alcohol level between .15 and .19. (RT 6:1017-1019.)

At about midnight, either Burris or Oskierko escorted the courier for the last time to the courier's car. (Supp.RT 71.) There was substantial evidence that no other money remained in the restaurant after that time. (Supp.RT 71.)

> "Q. So it's fair to say that by the time that you or Oskierko escorted that individual about midnight out, that there was no other money in the Gala which was a result of the ticket sales, correct?
>
> "A. Yes, sir." (Supp.RT 71, lines 13-17.)

Although there was then no other work to do, Officers Burris and Oskierko remained at the restaurant. (Supp.RT 70-71, 85-87; RT 3:616-617.)

4. The Dance Is Broken Up; Petitioner Melendez, His Friends And Others Return To The Gala Restaurant To Seek Refunds.

Petitioner Melendez was invited to go to the dance by a co-worker, Mario. (RT 4:713; 4:718-719.) He, Mario and several others went to the Gala Restaurant in two cars to purchase their tickets. (RT 1:182-183.) After buying tickets at the Gala, they drove to the location of the dance, only to observe that the dance was being broken up by police. (RT 1:184-186.) So, Melendez and the others turned around, never getting out of their cars, and returned to the Gala to seek refunds. (RT 1:186-187.)

There was evidence that tickets were no longer being sold when Melendez and his companions returned to the restaurant. For example, witness Tammy Salsido testified that when the group returned to the Gala Restaurant to seek refunds, "There were a few people just standing around," and they "wanted their money back." (RT 2:316, lines 14-15, 2:359, lines 3-10 and 26-27.) At no time did Salsido testify that any of the people in the parking lot were seeking to *buy* tickets.

Contrary to the Court of Appeal's recitation of "undisputed" evidence that one of the sellers was "gripping the cash box" (App. 22), there was *specific testimony that no cash box was present* when Melendez and his group returned. For example, Jason Hogan specifically testified that during the 10 to 15 minutes he and others were speaking with the women at the table about refunds, there was no cash box on the table:

"Q. *Did they have a cash box on the table?*

"A. *No, sir.*

"Q. Was there anything on the table?

"A. No, sir." (RT 3:508, lines 9-12; emphasis added.)

And, Salsido directly testified that she did not recall seeing a cash box on the table. (RT 2:360-361.)

Burris testified that the last time Oskierko and he escorted the courier off the premises with the money was "Somewhere around 12 o'clock." (Supp.RT 70, line 10.) Burris then testified that the first customers returned for refunds "about 10 or 15 minutes later at the most." (Supp. RT 70, line 15.) It is undisputed that several people returned seeking refunds before Melendez and his group returned. Jason Hogan, who was with Melendez, testified that he and his group were outside the building for "About 10, 15 minutes, maybe sir, maybe a little longer" before they entered the restaurant. (RT 3:507, line 27 – 508, line 3.) Additional time necessarily elapsed between the time the refund seekers entered the restaurant and the moment Burris shot Melendez. Accordingly, the jury presumably concluded that a significant amount of time, at least 30 minutes, elapsed between Burris' and Oskierko's last services as private security guards and the time Melendez was shot.

5. Officer Burris Shoots Petitioner Melendez And Arrests Him For Assault On A Police Officer (Oskierko) In The Performance Of His Lawful Duties.

When Melendez and the others approached the door, the two women who had earlier been selling the tickets stated that no refunds could be made. (RT 1:190.) Both the ticket sellers and the people in the crowd began yelling. (RT 1:190-192, 3:443-445.) However, there were no threats of any physical action against the women. (RT 1:192, 3:450-451, 3:620, 8:1522.) Oskierko approached and kicked over the ticket sellers' table. (RT 1:193.) Several people

stepped into the room. (RT 1:195.) Oskierko then fired several "warning" shots. (Supp. RT 97-98, 103-111; RT 8:1521.)

Melendez walked calmly toward Oskierko to talk to him. (RT 1:200-201.) Oskierko responded by kicking Melendez, who doubled over. Burris, who was an arm's length away, immediately shot Melendez in the back. (RT 1:203, 1:205, 2:227.) Burris then jumped on Melendez's back, put his knee on it, and handcuffed Melendez, despite the fact that Melendez was bleeding profusely. (RT 1:205, 1:207, 2:274, 2:293.) Melendez *never* touched Oskierko's gun or either officer. (RT 1:204.)

The record is replete with testimony that both Oskierko and Burris repeatedly identified themselves as "LAPD" and "police officers" from the time the refund dispute arose until Burris shot Melendez in the back. (See Supp.RT 96, 99-100; RT 1:143, 1:165-171, 1:172, 2:392, 3:621-623, 7:1328-1329, 8:1487, 8:1489, 8:1490, 8:1491, 8:1621-1622.) For example, Burris testified he identified himself as a police officer three or four times very loudly before Oskierko fired the first shot. (Supp.RT 100.) Burris explained:

> "Q. And you said it [that you were a police officer] because you wanted to exercise your authority as a police officer of the Los Angeles Police Department, correct?
>
> "A. I said it because the situation changed from a business dispute to *a possible assault* on the two women employees.
>
> "Q. *And that's why you wanted to exert your authority as a police officer, correct?*
>
> "A. *Yes, sir.*
>
> "Q. . . . *It had nothing to do with the money, right?*

"A. *Correct.*" (Supp.RT 100, lines 9-27; emphasis added.)

Burris specifically denied he shot Melendez as part of Burris' job as a private security guard. (RT 1:143.) At his deposition, Burris testified he identified himself as a Los Angeles Police Officer and, when drawing his gun, was intending to use his authority as a police officer. (RT 1:165-167.) Burris testified, without contradiction by any other evidence, that when he arrested Melendez he believed he was acting under his powers as a police officer. (RT 1:172.) Oskierko also specifically testified as follows:

"Q. . . . *when you identified yourself as a police officer you did it to exert your authority as a police officer, correct*?

"A. *Yes, sir.*" (RT 8:1490, lines 18-21; emphasis added.)

The LAPD sought felony charges against Melendez for attempting to take a firearm from a police officer engaged in the performance of his lawful duties (Cal. Penal Code section 148(d)), and the District Attorney filed those charges. The case was later dismissed in Superior Court. (RT 9:1713.)

6. Neither Burris Nor Oskierko Is Disciplined For Shooting Melendez. The LAPD Finds Burris And Oskierko Acted "Appropriately" In Identifying Themselves As Los Angeles Police Officers.

Following the incident, Oskierko resigned from the LAPD and began employment with the Kirkland, Washington Police Department. (RT 8:1452.)

Burris was suspended for two days without pay for failing to have a valid permit to work the private security job, and an additional seven days for improper tactics in

showing his gun. But the LAPD did not lodge a complaint against Burris for shooting Melendez. (AA 2:330, 2:336-337, 2:340; RT 1:110-111, 1:126.) LAPD Chief Daryl Gates ruled that Burris' act of showing his gun was "out of policy," but that the actual shooting of Melendez was "within policy," based upon Burris' version of the facts that Melendez was trying to wrestle a gun away from Oskierko. (RT 1:113, 1:122-127.) Burris was not required to attend any special training sessions as a result of the incident. (RT 1:126.) The LAPD's Notice of Proposed Disciplinary Action stated in part:

> "The investigation also revealed that all four officers [including two at the site of the underground party] *identified themselves as police officers* while engaged in outside employment. While this is normally considered misconduct, *in this case it appears to be appropriate*. Oskierko and Burris only identified themselves after they were being assaulted and it appeared they might have to use deadly force." (App. 2:339; emphasis added.)

7. Expert And Percipient Testimony Also Establishes That Burris And Oskierko Acted Within The Scope Of Their Employment And That The City Violated Melendez's Constitutional Rights Under 42 U.S.C. Section 1983.

Petitioners presented percipient and expert testimony on the two key issues in the case, i.e., scope of employment and section 1983 liability. The City presented no expert or other witness on these subjects.

Retired LAPD Assistant Chief David Dotson testified on the basis of his personal knowledge about the LAPD's use of excessive force. (RT 7:1388.) Dotson had been a member of the LAPD for 34 years, including seven years

as Assistant Chief under Chief Daryl Gates. (RT 7:1388-1389.) His duties as Assistant Chief included reviewing complaints about excessive use of force. (RT 7:1390-1391.) Dotson admitted:

> "My opinion was that the Department did a very poor job of holding supervision and command responsible for the activities for their subordinates, including their uses of force. . . . [This] went all the way to the Chief." (RT 7:1393, lines 8-16.)

> "In my opinion, it was an insensitivity or a lack of understanding of supervision's appropriate role, rather than a lack of actual attention." (RT 7:1393, lines 18-20.)

In response to a question whether the LAPD's policies were not being enforced, Dotson replied, "I'd have to draw that conclusion since I believe the policies are – are adequate in that regard." (RT 7:1393, lines 25-26.) When asked whether Chief Gates was indifferent to the needs of the community and of supervision, Dotson testified, "I don't believe he was indifferent. I believe that he was not as sensitive as he could have been to the needs of the community." (RT 7:1394, lines 24-26.)

Dotson conveyed each of the above opinions to Chief Gates while Dotson was still Assistant Chief. (RT 7:1391, 7:1392, 7:1394.)

Frank Saunders, a former police officer and a consultant on police procedures, testified as an expert, based upon his knowledge of this case and about 80 other LAPD cases he had reviewed, of which 80% to 90% involved use of excessive force. He testified, " . . . I have the opinion that *clearly you could show a pattern of problems of excessive force that were ignored or not treated properly*" by the LAPD. (RT 5:859, lines 25-27; emphasis added.)

8. Adan Melendez's And Rosa Melendez's Damages.

There is no dispute on this appeal that Adan Melendez's injuries were catastrophic and permanent. The jury awarded him $9,250,000 and awarded Rosa Melendez $1,500,000 for loss of consortium. These awards were vacated as against respondent City by the Court of Appeals' decision.

9. The Lawsuit And Judgment In Favor Of The Melendezes.

Petitioners' original Complaint was filed on September 27, 1991. (AA 1:1.) A First Amended Complaint was filed on February 7, 1992. (AA 1:38-78.) This complaint included causes of action (1) against the City based on the assault and battery by Oskierko and Burris, (2) for the City's own negligence and (3) for violation of Melendez's civil rights under federal law. After various pretrial proceedings, the action went to trial against appellant City, Burris, Oskierko and Chief of Police Gates.[4]

The jury returned a lengthy special verdict, which included the following:

Questions 1 and 2: Officers Burris and Oskierko deprived Adan Melendez of his constitutional rights. (12-0 and 11-1 votes.) (AA 1:174; RT 11:2131-2133.)

Question 3: Burris' and Oskierko's acts were a legal cause of injury and damage to Adan Melendez. (12-0 votes.) (AA 1:174; RT 11:2133-2135.)

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[4] During trial, plaintiffs dismissed Chief Gates as a defendant. (RT 7:1430.) Petitioners' children were also plaintiffs until the court granted the City's nonsuit motion as to them. (RT 7:1439.)

Question 4: Adan Melendez was deprived of his constitutional rights by an official policy of the LAPD. (11-1 vote.) (AA 1:175; RT 11:2136-2137.)

Question 5: Officer Burris was acting within the scope of his authority and employment as a Los Angeles Police Officer when he shot Melendez. (12-0 vote.) (AA 1:175; RT 11:2137-2138.)

Questions 8 and 9: Officer Burris was neither acting in self-defense nor in defense of others when he shot Melendez. (11-1 votes.) (AA 1:175; RT 2140-2141.)

Questions 14 and 15: The City was negligent and its negligence was a legal cause of injury to Melendez. (12-0 votes.) (AA 1:176; RT 11:2145-2147.)

Question 20: The "total amount of damages including economic and non-economic damages" suffered by plaintiff Adan Melendez was $9,250,000. (10-2 votes.) (AA 1:178; RT 11:2153-2158.)

Question 21: The battery and negligence were legal causes of loss of consortium injury to plaintiff Rosa Melendez. (12-0 and 11-1 votes.) (AA 1:178; RT 11:2158-2160.)

Question 22: The total amount of damages suffered by plaintiff Rosa Melendez for loss of consortium was $1,500,000. (AA 1:178; RT 11:2160-2162.)

Based on the jury's special verdict, the court entered judgment *inter alia* on the battery and federal civil rights causes of action jointly and severally against the City and Officer Burris for $2,612,500, jointly and severally against the City and Officer Oskierko for $2,612,500, and against the City alone in the further amount of $4,025,000. (App. 1:179.) The court entered judgment for loss of consortium in favor of Rosa Melendez against the City and Officer Burris jointly and severally in the amount of $750,000 and

against the City and Officer Oskierko jointly and severally in the amount of $750,000. (App. 1:179.) The judgment also directed that the defendants were entitled to a credit for $550,000, representing petitioners' settlement with a codefendant, on the negligent shooting cause of action only. (App. 1:179-180.) Finally, the judgment recited that the above awards are not cumulative and that the maximum judgment for Adan Melendez against the City is $9,250,000, less the $550,000 settlement, for a total of $8,700,000. (AA 1:180.)

The City alone appealed from the judgment. (AA 1:321.) On appeal, the Court of Appeal reversed the entire judgment and directed that judgment be entered in favor of respondent City as a matter of law. (See App. 24.)

10. The California Court of Appeal's Analysis Of The City's Liability Under Section 1983.

Before reaching the section 1983 issue, the California Court of Appeal reversed the portions of the judgment that had been based upon state law respondeat superior and direct liability theories. The Court held those causes of action were barred by California Penal Code section 70, subd. (d), which, as interpreted by the Court of Appeal, immunizes a police officer's principal employer (here, respondent City of Los Angeles) from all civil liability arising out of the officer's part-time private employment, unless the statute's conditions are satisfied.[5] (The full text of section 70 is set forth at App. 27-30.)

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[5] There is no dispute that the statutory conditions, which include the public employer's consent to the part-time employment, were not met here.

The Court of Appeal also held to be immaterial the evidence – credited by the jury – that the officers had completed their private security guard work before Burris shot petitioner Adan Melendez, because the shooting nonetheless "arose out of" the private work within the meaning of section 70(d). Thus, the City remained immune from liability for the officers' improper acts, (1) even though Burris and Oskierko had repeatedly identified themselves as LAPD officers and had used their Department approved guns in an effort to quiet the refund seekers, (2) even though, as discussed above, California statutes and case law give local police officers statewide authority to make arrests while off duty for offenses committed in their presence and (3) even though Burris shot and arrested petitioner Melendez for a purported offense against an officer in the performance of his lawful duties.

Then, the California Court of Appeal *reversed the part of the judgment based on the Civil Rights Act (42 U.S.C. section 1983)* by holding that, as a matter of law, Officers Burris and Oskierko were not "state actors" acting "under color of law" and because:

> "The injuries suffered [by Adan Melendez] did not flow from any state policy or custom. *Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala Restaurant.*" (App. 23; emphasis added.)

Having reached the above conclusions, the Court of Appeal then stated: "We need not and do not decide" whether the numerous prior complaints against Officer Burris "were sufficient to alert [the City] to any dangerous propensity by either officer." (App. 20.)

Petitioners sought discretionary review by the California Supreme Court. They contended, *inter alia*, (1) that California could not interpret its Penal Code section 70(d) to restrict the meaning of the Civil Rights Act's term "under color of law" and (2) that, as the jury found here, a City's continuing indifference to the use of excessive force by its officers in general and by Officer Burris in particular, may be a cause of injury under the Civil Rights Act. The California Supreme Court denied review by a 6 to 1 vote, on June 24, 1998. (App. 26.)

REASONS FOR CERTIORARI

I. CERTIORARI IS NECESSARY AND APPROPRIATE TO REVIEW THE QUESTION WHETHER A STATE MAY BY LEGISLATION RESTRICT OR ELIMINATE THE "COLOR OF LAW" PROVISION OF THE CIVIL RIGHTS ACT (42 U.S.C. Section 1983).

Based upon its interpretation of Cal. Penal Code section 70, subd. (d), the California Court of Appeal has held there was no state actor "whose actions triggered the statute [42 U.S.C. sec. 1983]." (App. 23.) In effect, the California Court of Appeal has equated (or limited) the federal meaning of "color of law" with California's definition of "scope of employment." This rationale enabled the Court to disregard, for "color of law" purposes, the undisputed facts that: (1) the officers were carrying and displayed their official Los Angeles Police Department badges; (2) they repeatedly identified themselves as Los Angeles police officers; (3) they used their department approved guns (which were not required for purposes of the private security guard employment); and (4) Officer Burris, who shot petitioner Adan Melendez, then arrested him for an offense against a police officer in the lawful

performance of his duties (Cal. Penal Code section 148(d)).

We shall now discuss why this Honorable Court should grant this petition and declare whether a state may eviscerate the "color of law" provision of section 1983, as California has done here.

" . . . the historic purpose of section 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the Fourteenth Amendment." (*Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 948, 102 S.Ct. 2744, 2759, 73 L.Ed.2d 482 (1982), citing *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). See also, *Howlett v. Rose*, 496 U.S. 356, 358, 110 S.Ct. 2430, 2433, 110 L.Ed.2d 332 (1990) [The primary purposes of section 1983 are compensation and deterrence "for violations of federal rights committed by persons acting under color of state law."])

As this Court explained in *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and *made possible only because the wrongdoer is clothed with the authority of state law*, is action taken 'under color of' state law."[6] (Emphasis added. See also, *Screws v. United States*, 325 U.S. 91, 108, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945) ["The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.' "].)

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[6] The California Court of Appeal's decision effectively eviscerates this rule by equating scope of employment under state law with color of law under section 1983.

And, as juries are instructed from 3 Devitt, Blackmar & Wolfe, *Federal Jury Practice and Instructions* (4th ed.) ch. 103, sec. 103.04, p. 947: "Acts are done 'under color of . . . law' of a state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their authority. In order for unlawful acts of an official to be done 'under color of any law,' however, the unlawful acts must be done *while the official is purporting or pretending to act in the performance of his official duties;* that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official. . . . " (Emphasis added.)[7]

Moreover, "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. *It is irrelevant that* he might have taken the same action had he acted in a purely private capacity or that *the particular action which he took was not authorized by state law.*"[8] (*Griffin v. State of Maryland*, 378 U.S. 130, 135, 84 S.Ct. 1770, 1773, 12 L.Ed.2d 754 (1964; emphasis added.))

In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988), this Court further explained that *"Egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded. . . . "* (Emphasis added.) Similarly, in *Howlett v. Rose, supra,* 496 U.S. 356, 371, 110 S.Ct. 2430, 2441, 110

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[7] The California Court of Appeal's decision substantially eviscerates this instruction by equating scope of employment under state law with color of law under section 1983.

[8] The California Court of Appeal's decision effectively eviscerates this rule by equating scope of employment under state law with color of law under section 1983.

L.Ed.2d 332, this Court held: "An excuse that is inconsistent with or violates federal law is not a valid excuse: *The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.*" (Emphasis added.)

In summary, certiorari is necessary and appropriate here to declare whether a state, such as California here, may eviscerate and indeed overrule section 1983 and this Court's numerous proclamations concerning the purposes of that statute. Conversely, if the California Court of Appeal's decision is permitted to stand, the prospect of similar legislation and court decisions in other states would be both real and disturbing.

II. THIS CASE IS ALSO APPROPRIATE FOR REVIEW BY CERTIORARI IN ORDER TO RESOLVE QUESTIONS CONCERNING LIABILITY UNDER THE CIVIL RIGHTS ACT (42 U.S.C. Section 1983) LEFT UNANSWERED BY *BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA V. BROWN.*

To sustain an action against a municipality, under the Civil Rights Act (42 U.S.C. section 1983), a plaintiff must show that (1) he or she possessed a constitutional right of which he or she was deprived, (2) the municipality had a policy which at least amounted to "deliberate indifference" to the plaintiff's constitutional right, and (3) action pursuant to that policy caused a violation of that constitutional right. (*City of Canton v. Harris*, 489 U.S. 378, 385-392, 109 S.Ct. 1197, 1203-1206, 103 L.Ed.2d 412 (1989); *Monell v. Dept. of Social Services of City of New York*, 436

U.S. 658, 694, 98 S.Ct. 2018, 2037-2038, 56 L.Ed.2d 611 (1978).)[9]

There is no dispute in the present case that the Chief of the Los Angeles Police Department, Daryl Gates, was a policymaker for respondent City. (See *McMillian v. Monroe County, Ala.*, ___ U.S. ___, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) ["[Chief] Gates is an official policymaker for the City [of Los Angeles] on police matters."].)

Larez is also pertinent to this petition because it summarizes pertinent rules in the context of a similar case involving respondent City of Los Angeles:

> "[Los Angeles Police Chief] Gates' official liability . . . must be attributable to official policy or custom. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). . . . To the extent that the terms 'policy' and 'custom' imply something beyond a single decision, official liability may also be imposed where a first-time decision to adopt a particular course of action is directed by a governmentally authorized decision maker. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). Evidence that there was a custom or policy to

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[9] Respondent City has acknowledged it never challenged the judgment based on the jury's verdict on the ground that petitioners failed to present evidence of indifference to excessive force. The City instead contended that even if such evidence was presented, there was insufficient evidence to permit a jury to find that the indifference *caused* Melendez's injuries. (Answer to Petn. for Rehearing, p. 13; Appellant's Reply Brief, p. 40.)

> use excessive force, for example, would be sufficient to warrant the imposition of official liability under *Canton* and its progeny. Also, evidence that Chief Gates, an authorized policymaker on police matters . . . made, or ratified a decision that deprived plaintiffs of their constitutional rights would suffice for official liability under *Pembaur*." (946 F.2d at 646.)

The appropriateness of review by certiorari in the present case is particularly shown by analysis of the majority and dissenting opinions in this Court's recent decision in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

We begin our analysis with a comparison of significant holdings stated in the *Bryan* majority's opinion and the facts of the present case:

1. *Bryan*: "Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind plaintiff's deprivation of federal rights." (117 S.Ct. at 1386, citing *Monell v. New York City Dept. of Social Services, supra*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2027, 56 L.Ed.2d 611; emphasis in original.)

The Present Case: The record contains evidence – credited by the jury – that the Chief of the Los Angeles Police Department willfully ignored and refused to take remedial action about numerous incidents of misconduct by Los Angeles police officers, including numerous acts of misconduct by the very officer (Burris) who shot petitioner Adan Melendez.

2. *Bryan*: The Sheriff of Bryan County knew or should have known when he was considering hiring Deputy Burns that Burns had a record of driving infractions

and had pled guilty to various driving-related and other misdemeanors, including assault and battery. (117 S.Ct. at 1387.)

The Present Case: Los Angeles Police Chief Gates had been specifically advised to take remedial action, for example, by Assistant Chief Dotson, concerning general acts of misconduct by department officers and, by Officer Burris' supervising officer, with regard to Burris' numerous prior incidents of excessive force on civilians.

3. *Bryan*: " . . . we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." (117 S.Ct. at 1388.)

The Present Case: The existence of a policy and custom here was specifically testified to by Assistant Chief Dotson and by expert witness Saunders, whose testimony was credited by the jury.

4. *Bryan*: " . . . an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." (117 S.Ct. at 1388.)

The Present Case: Such a "custom" was shown by the testimony of Assistant Chief Dotson and by expert witness Saunders.

5. *Bryan*: " . . . a plaintiff . . . must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." (117 S.Ct. at 1388.)

The Present Case: Causation was found by the jury on the basis of instructions which the City did not challenge on appeal.

6. *Bryan*: The majority's opinion suggests the near impossibility of showing a "policy" or "custom" based upon evidence of a single decision by a policymaker. (117 S.Ct. at 1389, 1391.)

The Present Case: The record here shows numerous decisions and failures to take action, both as to general acts of excessive force and acts specifically committed by Officer Burris.

7. *Bryan*: "We concluded in *Canton* that an 'inadequate training' claim could be the basis for § 1983 liability in 'limited circumstances.' " (117 S.Ct. at 1390.)

The Present Case: Here, there was evidence of inadequate training, plus the failure to discipline officers, including particularly Officer Burris. Respondent City was on notice that "a new program is called for." (117 S.Ct. at 1390.) This evidence justified the jury's finding of deliberate indifference on the part of the LAPD's Chief and respondent City.

8. *Bryan*: "[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations . . . " (117 S.Ct. 1390, quoting *Canton*, 489 U.S. at 390-391, 109 S.Ct. at 1205-1206 (O'Connor, J., concurring in part and dissenting in part).)

The Present Case: Our case exactly.

9. *Bryan*: In *Canton*, "we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." (117 S.Ct. at 1391.)

The Present Case: The jury found that this was such a case.

10. *Bryan*: " . . . predicting the consequence of a single hiring decision, even when based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." (117 S.Ct. at 1391.)

The Present Case: This case presents the easier prediction, especially in light of Officer Burris' specific and lengthy history of use of excessive force and the failure of the LAPD to impose any discipline upon him.

11. *Bryan*: " . . . A finding of culpability . . . must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff." (117 S.Ct. at 1392; emphasis in original.)

The Present Case: Petitioners submit that certiorari is necessary here to declare whether this is indeed such a case and to reconcile the above holding with the dissenting opinion in *Bryan* by Justice Souter, as discussed below.

To summarize, certiorari is appropriate here not only to explain why imposition of liability upon a municipality is appropriate under the majority's opinion in *Bryan*, but also to reconcile any differences perceived by this Court in the five-member majority's opinion and the dissenting opinions in *Bryan*. For example, Justice Souter noted in his dissent in *Bryan* that a municipal policy may exist within the meaning of section 1983 where a policymaker "sits on his hands after repeated, unlawful acts of subordinate officers and that failure 'evidences a "deliberate indifference" to the rights of [the municipality's] inhabitants.' " (117 S.Ct. at 1395.) As applied to the present petition, Justice Souter's comment provides an additional basis for certiorari, i.e., to analyze the impact of such

circumstances in the context of a section 1983 suit because the facts of the present case show precisely the sort of conduct noted by Justice Souter.

Justice Souter's dissent also raises the question whether the majority established a new standard for deliberate indifference, i.e., "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the *plainly obvious consequence* of the decision to hire the applicant would be the deprivation of a third party's federally protected right [would] official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.' " (117 S.Ct. at 1392; emphasis added.) Petitioners contend here that the shooting of petitioner Adan Melendez by Officer Burris was a "plainly obvious consequence" of the LAPD's deliberate indifference to excessive force, including Burris' particular record of excessive force.

The City argued below that the shooting was not a plainly obvious consequence because none of Burris' prior instances of excessive force involved shooting a civilian, only instances where he beat and/or choked them. The present case is thus an appropriate vehicle for explication of this question.

The present case is also an appropriate vehicle to re-examine the question whether liability may or should be imposed upon a municipality based upon principles of vicarious or respondeat superior liability, as discussed in Justice Breyer's dissenting opinion. (117 S.Ct. at 1402-1404.)

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Honorable Court grant this petition and resolve the significant issues relating to "color of law" and causation, under the Civil Rights Act (42 U.S.C. section 1983) presented by this case.

Respectfully submitted,

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MELENDEZ *v.* CITY OF LOS ANGELES
63 Cal.App.4th 1; 73 Cal.Rptr.2d 469 [Apr. 1998]

[No. B104126, Second Dist., Div. Four. Apr. 14, 1998.]

ADAN MELENDEZ et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES, Defendant and Appellant.

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OPINION

EPSTEIN, Acting P.J. – In October 1990, Adan Melendez was shot while attempting to obtain a refund for a ticket he had bought to an "underground" party that was broken up by police. He was one of many seeking refunds at the location where tickets to the concert had been sold. He was kicked by a security guard, then shot by another guard. His injuries are permanent and severe. Because the security guards were off-duty officers of the Los Angeles Police Department, an agency of the City of Los Angeles, he sued the City for damages. His wife sued for consortium damages. Both plaintiffs were successful, obtaining substantial verdicts that ripened into judgments. Their theories of recovery are barred by operation of Penal Code section 70, as we shall discuss. Because the

bar of that statute applies, we must reverse the judgment against the City.

Factual and Procedural Summary

We must, of course, resolve all factual disputes in the case in favor of respondents, who were successful at trial, so long as that result is supported by substantial evidence. For the same reason, respondents are entitled to the benefit of all intendments that may be derived from the jury findings. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873 [197 Cal.Rptr. 925] [substantial evidence rule]; *Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412 [210 Cal.Rptr. 509] [similar]; see also, *Short v. Nevada Joint Union High School Dist.* (1985) 163 Cal.App.3d 1087, 1095 [210 Cal.Rptr. 297] [appellate review of denial of directed verdict]; *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 471 [38 Cal.Rptr.2d 739].) The following factual summary is based on that standard.

Laslo Borzai made plans to hold an "underground" or "warehouse" party. These events are attended by persons who buy tickets, and in this case the price of admission was $20. Borzai rented the Gala Restaurant, owned by the Tassop Family Trust, for sale of tickets. A table was set up at an entrance to the restaurant, facing a parking area. Customers approached the table to buy tickets. Two young women sold the tickets. The restaurant opened for ticket sales at about 9 p.m., and sales began shortly after that. Two persons were hired as security guards for the occasion. Their function was to protect the money collected. The guards were Thomas Burris and Stephen

Oskierko. Each was a full-time officer of the Los Angeles Police Department (LAPD), and each was working this event while off-duty. They were either employed directly by Borzai, or by Lawman Security which, it may be inferred, had contracted with Borzai. Neither guard was in uniform, and neither had the permission of the City to work on this occasion as a security guard.

A friend of plaintiff/respondent Adan Melendez suggested that they go to the party, and Melendez eventually agreed to go. He and two friends arrived at the Gala Restaurant at about 11 p.m., and had to wait about a half-hour to buy tickets. They then drove to the location of the party, a trip that required about another 10 minutes. They arrived to see the party being broken up by police. Given the circumstances, they did not try to go into the party, but turned around and went back to the restaurant to obtain refunds.

When they arrived there, at about midnight, some 10 persons already were seeking refunds. The two women who had been selling tickets said that no refunds would be made, and some persons began to yell. Burris and Oskierko were present. Each was armed with an LAPD-approved pistol, each had his official badge attached to his belt. Instead of a LAPD uniform, each wore casual clothes and a blue nylon jacket on which the word "Security" was printed in large white letters, front and back.

Burris and Oskierko approached the entrance area, telling the persons to be on their way. Someone said the two were security guards, and, in effect, could do nothing. Oskierko kicked the table that had been used for selling tickets, and it flipped over. He identified himself

as a police officer, as did Burris. Burris also swept back his jacket, displaying his badge and gun. But the group of customers kept pressing forward, some yelling that the two were only security officers, not police. Oskierko drew his weapon and fired several shots at the ceiling. Someone said the shots were blanks, and Oskierko then fired a round into the overturned table or into the floor. During this time, Melendez walked into the room and up to Oskierko, intending to talk to him about a refund. Oskierko and Burris testified that Melendez grabbed Oskierko's pistol, but the jury rejected that version. Oskierko kicked Melendez, causing him to crouch over. Burris shot Melendez in the back, then placed a knee at Melendez' back and handcuffed him.

Melendez is a paraplegic as a result of the shooting. Oskierko resigned from the LAPD, and accepted other employment as a police officer in the State of Washington. Burris was disciplined for failing to have LAPD permission to work the private security job, and for improper tactics in showing his gun. But he was not disciplined for shooting Melendez. The Department ruled that showing his gun was out of policy, but that the shooting was within policy, based on Burris' version of the events.

Adan Melendez and his wife brought an action against the restaurant owner and operator, the underground party organizer, Officers Burris and Oskierko, Chief of Police Gates, and the City of Los Angeles. Melendez' suit was for the injuries he had sustained. His wife sued for loss of consortium. Melendez and his wife eventually settled against the restaurant and party defendants, and dismissed Chief Gates. The case proceeded to

trial, by Mr. and Mrs. Melendez against defendants Burris, Oskierko and the City. The City provided no defense to the officers, who appear not to have participated in the lawsuit beyond denying liability and testifying [as witnesses].

Respondents presented three theories of liability against the City: respondeat superior, based on the tortious acts of Burris and Oskierko; "direct" liability for failure of the City to adequately supervise these employees; and Civil Rights Act liability under 42 United States Code section 1983.

The jury returned a detailed special verdict. As reduced to a judgment, the award for Melendez against the City, Burris and Oskierko, was $9,250,000 less a good faith settlement amount of $550,000, for a net of $8,700,000. The loss of consortium award in favor of Mrs. Melendez was $750,000 against the city and Burris, and the same amount, $750,000, against the city and Oskierko. (The City attacks the special verdict as inadequate and confusing. We need not and do not reach that issue.) The City unsuccessfully moved for new trial and judgment notwithstanding the verdict. It filed a timely notice of appeal. Neither Burris nor Oskierko has appealed.

Discussion

I

Since it is central to the case, we begin with a discussion of Penal Code section 70 and related statutes. (For convenience, we hereafter refer to the former as section 70.) The statute has been amended several times since its

initial enactment as a Field Code provision in 1872. In 1990, when the pertinent events in this case occurred, it read as follows:

"(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.

"(b) This section does not prohibit deputy registrars of voters from receiving compensation when authorized by local ordinance from any candidate, political committee, or statewide political organization for securing the registration of voters.

"(c) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman for a public entity while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency, and exercising the powers of a peace officer concurrently with that employment, provided that the peace officer is in a police uniform and is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (*l*) of Section 7522 of the Business and Professions Code. Notwithstanding the above provisions, any and all civil and criminal liability arising out of the secondary employment of any peace officer pursuant

to this subdivision shall be borne by the officer's secondary employer.

"It is the intent of the Legislature by this subdivision to abrogate the holdings in People v. Corey, 21 Cal.3d 738 [147 Cal.Rptr. 639, 581 P.2d 644], and Cervantez v. J.C. Penney Co., 24 Cal.3d 579 [156 Cal.Rptr. 198, 595 P.2d 975], to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, by a public entity, while wearing a police uniform as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment.

"(d) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer, and exercising the powers of a peace officer concurrently with that employment, provided that all of the following are true:

"(1) The peace officer is in his or her police uniform.

"(2) The casual or part-time employment as a private security guard or patrolman is approved by the county board of supervisors with jurisdiction over the principal employer or by the board's designee or by the city council with jurisdiction over the principal employer or by the council's designee.

"(3) The wearing of uniforms and equipment is approved by the principal employer.

"(4) the peace officer is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (*l*) of Section 7522 of the Business and Professions Code.

"Notwithstanding the above provisions, a peace officer while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency shall not exercise the powers of a peace officer if employed by a private employer as a security guard during a strike, lockout, picketing, or other physical demonstration of a labor dispute at the site of the strike, lockout, picketing, or other physical demonstration of a labor dispute. The issue of whether or not casual or part-time employment as a private security guard or patrolman pursuant to this subdivision is to be approved shall not be a subject for collective bargaining. Any and all civil and criminal liability arising out of the secondary employment of any peace officer pursuant to this subdivision shall be borne by the officer's principal employer. The principal employer may require the secondary employer to enter into an indemnity agreement as a condition of approving casual or part-time employment pursuant to this subdivision.

"It is the intent of the Legislature by this subdivision to abrogate the holdings in People v. Corey, 21 Cal.3d 738, and Cervantez v. J.C. Penney Co., 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they

relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform approved by the principal employer, as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment." (Fns. omitted.)

(This is the 1984 version of the statute. It was amended again, in 1997 (Stats. 1997, ch. 452, § 7) to provide that the principal employer *shall* require the secondary employer to enter into an indemnity agreement as a condition to approving the casual or part-time employment.)

We shall return to a discussion of section 70 and the case law it affects. Before doing so we briefly refer to related statutes.

Penal Code section 830, and following provisions, define who are peace officers in California. The list includes sworn police officers of any city. (Pen. Code, § 830.1, subd. (a).) It is undisputed that Burris and Oskierko were peace officers within this definition. A peace officer is authorized to arrest for a public offense reasonably believed to have been committed in his or her presence. (Pen. Code, § 836, subd. (a)(1).)

Government Code section 1126 is a conflict of interest provision, generally prohibiting local public agency employees from engaging in inconsistent or incompatible employment. Unless approved by the appointing power, local public employees may not perform work for compensation outside their regular work, if their efforts will be subject to approval of some other officer or agency. Outside employment may be prohibited if it involves use

of the badge or uniform of the employee's regular employment. (See 65 Ops.Cal.Atty.Gen. 631, 636 (1982).)

The Business and Professions Code provisions referred to in section 70 are part of the Private Security Services Act, which governs licensing of persons and entities to engage in the private security business. Former section 7522 is now found in section 7582.2 of the same code. It provides exceptions to coverage of the statute. Subdivision (k) refers to peace officers while employed by a private employer pursuant to Government Code section 1126, and subdivision (*l*) refers to retired peace officers.

II

It has been, and remains, the rule that peace officers such as sworn personnel of the LAPD retain peace officer status and authority, both during and beyond regular duty hours. (See *People v. Derby* (1960) 177 Cal.App.2d 626, 630 [2 Cal.Rptr. 401].) A handful of older cases has examined the consequences of a peace officer working part-time, during off duty hours, for a private employer.

In *Dowdell v. Owl Drug. Co.* (1932) 121 Cal.App. 316 [8 P.2d 890], an off-duty policeman, working as a security guard for a drug store, caused the plaintiff to be arrested for shoplifting. The arrestee sued for false arrest, and recovered a $25,000 judgment. In reversing the judgment, the court pointed out that the guard was a peace officer, authorized to make an arrest on reasonable belief that a felony had been committed. The trial court, it appeared, had erroneously told the jury that there was no reasonable cause for arrest unless the value of property taken

exceeded $200. (121 Cal.App. at p. 319.) The court did not explicitly address whether the security guard was a peace officer when the arrest occurred, but that conclusion was implicit in its application of the peace officer statutes.

People v. Hooker (1967) 254 Cal.App.2d 878 [62 Cal.Rptr. 675] also involved a policeman working off-duty as a security guard for a drug store. The person he attempted to arrest for shoplifting resisted, and the issue was whether that person was guilty of battery on a police officer (Pen. Code, § 243). The guard was wearing his police uniform when the events occurred. The court held that the fact that the officer was working for a private employer when the battery occurred "need not weaken or destroy his continuing authority as a peace officer." (254 Cal.App.2d at p. 882.)

A third case, *People v. Millard* (1971) 15 Cal.App.3d 759 [93 Cal.Rptr. 402], involved the activities of two off-duty officers working as security guards for a store. The arrestee argued that his Fourth Amendment rights were violated because a guard had conducted an unreasonable, warrantless search. The prosecution countered that the guard was acting as a private security guard at the time, and, as a result, the Fourth Amendment had no application. The court disagreed, holding that in making the arrest the officer was acting as a police officer, not as a private person. Since the search by a police officer was not justified, the conviction was reversed.

Another case, decided shortly after *Millard*, concerned an off-duty police officer working during off-duty hours as a guard at a high school dance. In *People v. Townsend* (1971) 20 Cal.App.3d 688 [98 Cal.Rptr. 25], the

principal issue was whether the defendant was subject to the enhanced crime of battery on a police officer (Pen. Code, § 243). The court held that he was. (20 Cal.App.3d at p. 696.)

Each of these cases was disapproved by the Supreme Court. The Supreme Court decisions were a year apart, each written by the same justice. No later Supreme Court decision has questioned the correctness or application of either case.

The first case is *People v. Corey* (1978) 21 Cal.3d 738 [147 Cal.Rptr. 639, 581 P.2d 644]. Like *Hooker* and *Townsend*, it involved Penal Code section 243, battery on a peace officer. The issue was whether that statute applied to a battery on a peace officer who was privately employed, for compensation, as a security guard when the battery occurred. The holding is that it does not. The guard, Anderson, was an officer of the Sacramento Police Department. He was employed during off-duty hours to provide security at a dance sponsored by a private association. A would-be patron, trying to force entrance, struck the officer when he tried to apprehend her. (21 Cal.3d at p. 741.)

The court reviewed the statutory definition of peace officer, ("any policeman of a city . . . regularly employed and paid as such"), the Private Investigator and Adjuster Act (then, Bus. & Prof. Code, § 7500 et seq.), a published opinion of the Attorney General and, especially, section 70. At that time, section 70 did not include any of the material now in subdivisions (c) and (d).

The court wrote: "[T]he Legislature has specifically made illegal the receipt by any public employee or officer

of any 'emolument, gratuity or reward, or promise thereof . . . for doing an official act.' (Pen. Code, § 70.) Thus, the law and policy of this state forbid the policeman here involved from receiving pay from the sponsors of the event for performing his official duties. Thus, *if what Officer Anderson was doing was not in violation of law (Pen. Code, § 70), it must be because on his off-duty hours he was not performing his official duties, but rather performing only a private duty pursuant to contract. If he were engaged in such contractual activity, he was not engaged in the performance of his official duty, so as to bring the felony provisions of Penal Code section 243 into operation.* There is no reason to impute to the Legislature any intent to furnish to one acting as a private patrolman any special protection just because he is also in the employ of a city as a policeman." (*People v. Corey, supra,* 21 Cal.3d at pp. 745-746, fn. omitted, italics added.)

It followed, the court held, that Penal Code section 243, which serves to protect peace officers engaged in the performance of their duties by providing enhanced punishment for those who commit a battery on such an officer, "does not apply to peace officers who are assaulted within the course and scope of their private employment as security guards." (*People v. Corey, supra,* 21 Cal.3d at p. 746.) The *Hooker* and *Townsend* cases were disapproved to the extent inconsistent with the court's opinion. (*Ibid.*)

The dissenting justice argued that it does not follow that, because an off-duty peace officer is performing duties as a private security guard, he cannot use all reasonable force to make an arrest as a peace officer. (*People v. Corey, supra,* 21 Cal.3d at pp. 747-748 (conc. and

dis. opn. of Clark, J.).) The dissent is significant because it is a succinct summary of the view rejected by the majority.

The second case, by a unanimous court, is *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579 [156 Cal.Rptr. 198, 595 P.2d 975]. In that case, an off-duty officer, Dahlke, arrested a customer for shoplifting. Dahlke was working as a private security guard for a store when he made the arrest. The customer sued for false arrest and imprisonment, and various torts. The trial court's instructions were based on the conclusion that the guard was acting as a peace officer when the arrest was made, a result consistent with the *Dowdell* and *Millard* decisions. The court reversed the ensuing judgment for the defendants. It reiterated its *Corey* decision of the previous year: "Since a police officer is forbidden from receiving private payment for the performance of his official duties, we concluded in *Corey* that the officer there must have been performing private rather than official duties while he was acting within the course and scope of his private employment as a security guard during his off-duty hours." (24 Cal.3d at p. 588.)

That reasoning informed the decision in *Cervantez*: "If what Dahlke was doing was not in violation of Penal Code section 70, it must be because he was performing private rather than official duties while he was acting within the course and scope of his private employment with J.C. Penney. If Dahlke was performing only a private contractual duty at the time he arrested plaintiff, it logically follows that he was not acting pursuant to his official duties as a peace officer. Since it would have been illegal for Dahlke to have been acting as a peace officer in

the performance of official duties at the time he arrested *plaintiff pursuant to his private employment, we conclude* that Dahlke was acting as a private citizen when he arrested plaintiff. *It is thus the fact of private employment which operates to prevent a peace officer from acting in what would otherwise be his official capacity."* (24 Cal.3d at p. 588, italics added.) The court disapproved the *Dowdell* and *Millard* cases to the extent that they were inconsistent with its opinion. (24 Cal.3d at pp. 588-589.)

Respondents argue that *Cervantez* is distinguishable because there was a stipulation in the case that Dahlke was working as a full-time employee of a local police department and was acting within the scope of his employment at the Penney store when he made the arrest. The problem with this attempted distinction is that it played no role in the rationale of the Supreme Court's decision. (Respondents do not try to distinguish *Corey* on its facts.)

If one were to snapshot the law as it emerged after the *Corey* and *Cervantez* decisions, it was simply this: a peace officer who works as a security guard for pay by a private employer does not act as a peace officer during that private employment.

III

The Legislature responded, and the nature of its response is especially instructive.

A 1982 amendment reformulated the statute into subdivisions (a), (b) and (c). The substance of subdivision (c) allowed a peace officer to work, part-time, off-duty, and

for pay, as a private security guard for a *public* entity, so long as he or she did so in uniform and was subject to reasonable rules and regulations of the officer's principal law enforcement agency. If these requirements were met, the officer's acts were within the scope and protection provided by the law to peace officers exercising their official functions. Penal Code section 243 also was amended to apply to batteries against peace officers under these circumstances. (§ 70, subd. (c), and see Assem. Final Hist. (1979-1982) Statutory Record, p. 459; *Selected 1982 Cal. Legislation* (1982) 14 Pacific L.J. 357, 555.) Since Burris and Oskierko were working for a *private* employer when Melendez was shot, this statutory change does not directly apply to the case. But the next one does.

The final reformulation of the statute (to date) came in 1984, resulting in the provision as we have set it out earlier in this opinion. (See generally, *Selected 1984 Cal. Legislation* (1984) 16 Pacific L.J. 461, 612.) This legislation added subdivision (d), which establishes peace officer status in peace officers who work part-time as security guards for private employers. Unlike subdivision (c), which applies to part-time work for public entities, the benefits of subdivision (d) only apply "provided that all" of the circumstances in each of four enumerated subdivisions are true. Three of these are significant here: that the officer be in police uniform during the employment; that the part-time work is approved by the governing entity of the principal employer, or by the law enforcement agency as its designee; and that the principal employer approves the wearing of uniforms for such off-duty work.

If each of these provisions is satisfied, *then* the officer enjoys peace officer status in his or her part-time work.

To that degree, the *Corey* and *Cervantez* decisions are abrogated in favor of preexisting law. And the principal employer is liable for all civil and criminal liability flowing from the part-time work. (Although an indemnity agreement is encouraged, and now required, from the secondary employer.)

Taken together, these provisions present a comprehensive statutory scheme. If a police officer is to work as a private security guard for a private employer, members of the public must have the full notice provided by the uniform that the person is acting as a peace officer. They are thus effectively warned to govern their activity accordingly. And the principal employer has full control: it may allow its officers to work part-time, or not, according to its policy. It may, for example, allow some to do so while declining permission to others who have a doubtful record in connection with excessive force.

And an officer cannot work as a security guard for a private employer in connection with a labor dispute. Why is that exception provided? Because without it, the officer *would* have the authority and protection afforded peace officers while working for an employer in a labor dispute – a circumstance the Legislature did not want to allow.

The exceptions prove the rule. Peace officers who work as private security guards pursuant to the conditions laid out in the statute, have the authority and protection given peace officers in their usual, public work. Otherwise, they do not.

Several formal Attorney General opinions support these conclusions. (See 65 Ops.Cal.Atty.Gen. 631, 636 (1982) [in light of Gov. Code, § 1126, police officers may

not wear official uniform in private employment without permission of employing police agency]; 68 Ops.Cal. Atty.Gen. 80, 83 (1985) [reserve deputy sheriffs not peace officers when performing services as employees of private patrol operator]; 69 Ops.Cal.Atty.Gen. 119, 123 (1986) [under § 70, subd. (d), local agency employer of police officer not liable for acts of officer while engaged in work as off-duty private security guard wearing uniform of private employer].) These opinions, while not binding, are entitled to weight, and absent controlling authority, are persuasive. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796, 793 P.2d 2].)

Respondents point out that the statute is explicit in declaring when off-duty officers have the authority of peace officers, but that it does not literally say that police officers are without this authority when the statutory conditions are not satisfied. No doubt, it would have been clearer if this additional provision had been stated, but in the context of this statute it would almost be like an "and we really mean it" provision. The *Corey* and *Cervantez* cases already declare that police officers do *not* act as peace officers when privately employed and paid as security guards. The statutory response was to allow measured and circumscribed exceptions to that rule. No other construction of the statute makes sense.

As we have pointed out, neither Burris nor Oskierko was in uniform when Melendez was shot; neither had permission to do the off-duty work he was doing (the officer who did not resign was disciplined for doing it); and neither was authorized to work this unapproved assignment. Whatever these officers may have thought at

the time, it follows that neither was acting as a peace officer when Melendez was shot.

Since the officers were acting without official authority, there can be no respondeat superior basis for City liability.

The application of section 70, subdivision (d) was called to the attention of the trial court in City's motion for a directed verdict. Rejecting the City's argument, the trial court read a passage from *Inouye v. County of Los Angeles* (1994) 30 Cal.App.4th 278, 281 [35 Cal.Rptr.2d 367]: "The sole issue presented on this appeal is whether the County's practice of deeming its off-duty safety police officers to not be engaged in the performance of their duties operates to insulate the County from potential liability from the torts of these officers. We find that it does not."

The trial court misread *Inouye*. The question in that case was whether a public entity could insulate itself from liability for wrongful acts of its peace officer employees by the device of declaring that they are not acting as peace officers while off-duty. That ran against statutory provisions about the scope of peace officer duties and responsibilities. The *Inouye* court went on to say, "We further agree with the County's position that no guidance [for the case at hand] is to be derived from [the *Corey* and *Cervantez* cases], which hold that the duties and immunities attendant to peace officer status do not apply to an officer engaged in the performance of outside employment as a private security guard." (30 Cal.App.4th at p. 283.) That was not the issue in *Inouye*, but it is in our case.

Because the trial court concluded that section 70, subdivision (d), did not apply to the case, the jury was not instructed on any of the four "proviso" elements of that statute. Those elements simply were not addressed.

IV

The same circumstance defeats respondents' second basis of liability, that City failed to adequately supervise Burris and Oskierko. Respondents focus on citizen complaints against Burris, and on expert opinion testimony that the Department was not sufficiently sensitive to complaints of excessive force. City argues that the complaints in hand were not sufficient to alert it to any dangerous propensity by either officer. We need not and do not decide that issue. As we have discussed, each officer was acting on his own, and without City approval or, so far as the record shows, even knowledge. A major feature of section 70, subdivision (d) is the provision giving the principal law enforcement agency the authority to allow or not allow a particular officer to work a particular private security guard assignment. If a city in the situation of the City in this case could be held liable, the protection of the statute would be entirely removed and its condition meaningless. That is not a permissible construction.

V

Respondents argue, however, that section 70, subdivision (d) has no application to this case because by the time the shooting occurred, Burris and Oskierko had

completed their work as security guards and, like Cinderella's coach, had reverted to their former status, as off-duty peace officers with all rights and responsibilities that attach to that status. The argument is based on evidence, which we take as credited, that their sole responsibility was to guard the money collected from ticket sales.

There are at least two problems with this theory. The first is that it relies on an overly narrow reading of the statute. Section 70, subdivision (d) provides that, if its four enumerated conditions are satisfied, the principal employer (here, LAPD) is responsible for "[a]ny and all civil and criminal liability arising out of the secondary employment. . . . " Burris and Oskierko were at the Gala Restaurant solely on account of their engagement by, or through, Laslo Borzai, the party promoter. There was evidence that this secondary employment is the reason they were still there when customers returned seeking refunds. If so, the liability that ensued arose out of the secondary employment. Conceivably, that was a jury issue. Unfortunately, because of the view the trial court took of the statute, the jury was never instructed on the point.

The second problem is more fundamental. Respondents rely on testimony that the last courier to be escorted to a car had driven off with ticket proceeds before customers began to return, seeking refunds. The last courier to be escorted off the property left at about midnight. Burris was asked whether it was fair to say that by the time he or Oskierko escorted that courier, "there was no other money in the Gala which was a result of the ticket sales, correct?" Burris answered, "Yes, sir."

We must take it as true that the last time either Burris or Oskierko escorted a courier with ticket money to his or her car was about midnight, and that all ticket proceeds received to that point, not already transported, went with that courier. But the uncontroverted evidence also shows that the ticket sellers were still at the table about midnight when Melendez and his companions returned to the restaurant, and that tickets were still being sold. One of the sellers was "gripping the cash box." There was a line to buy tickets. And the restaurant manager, Tassop, had been told to keep the place open until 12:30 or 1 a.m. Thus, Burris and Oskierko had not yet completed their service, even assuming that their only responsibility was to "guard the money."

VI

Respondents' final theory of liability against the City is that Burris and Oskierko violated their civil rights, protected by the Civil Rights Act, 42 United States Code section 1983. That law imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws" of the United States.

Respondents count on evidence that Burris and Oskierko used excessive force in the encounter, and that there is a pattern of such problems when the law enforcement agency fails to deal properly with problems of excessive force, as the LAPD did in this case.

The Civil Rights Act extends to local as well as to state governments. (See *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 2037-2038, 56 L.Ed.2d 611].) But not every act by a government agent, violating a federal right, triggers liability. The court's task is to "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 2724, 105 L.Ed.2d 598].) The status of a person as a government employee whose acts can trigger liability under the law is determined by state law. (*McMillian v. Monroe County* (1997) 520 U.S. ___, ___ [117 S.Ct. 1734, 1737, 138 L.Ed.2d 1]. Even then, the government may not be held liable solely because it employs an errant officer; "[i]nstead, it is when execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. New York City Dept. of Social Services, supra,* 436 U.S. at p. 694 [98 S.Ct. at pp. 2037-2038], quoted in *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 349 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

The injury suffered by respondents did not flow from any state policy or custom. Nor was there a state actor whose actions triggered the statute. Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala Restaurant. Nor are any City employees responsible,

since none approved of Burris' or Oskierko's employment at the restaurant, much less of their use of force.

There is, in sum, no basis to hold the City under the Civil Rights Act, nor under any other theory respondents have presented.

DISPOSITION

The judgment is reversed with directions to enter a new and different judgment in favor of City as against respondents. Appellant to have its costs on appeal.

Hastings, J., and Czuleger, J.,* concurred.

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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SECOND APPELLATE DISTRICT
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DIVISION: 4 DATE: 05/05/98

Edward J. Horowitz
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RE: Melendez, Adan
vs.
Los Angeles, City of
2 Civil B104126
Los Angeles NO. BC038583

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Four, No. B104126
S070456

IN THE SUPREME COURT OF CALIFORNIA

(Filed Jun. 24, 1998)

ADAN MELENDEZ Et Al., Respondents

v.

CITY OF LOS ANGELES, Appellant

Respondents' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

California Penal Code section 70 provided (in 1990, when the pertinent events in this case occurred) as follows:

> "(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.
>
> "(b) This section does not prohibit deputy registrars of voters from receiving compensation when authorized by local ordinance from any candidate, political committee, or statewide political organization for securing the registration of voters.
>
> "(c) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman for a public entity while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency, and exercising the powers of a peace officer concurrently with that employment, provided that the peace officer is in a police uniform and is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code. Notwithstanding the above provisions, any and all civil and criminal liability arising out of the secondary employment of any peace

officer pursuant to this subdivision shall be borne by the officer's secondary employer.

"It is the intent of the Legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738 [147 Cal.Rptr. 639, 581 P.2d 644], and *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579 [156 Cal.Rptr. 198, 595 P.2d 975], to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, by a public entity, while wearing a police uniform as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment.

"(d) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer, and exercising the powers of a peace officer concurrently with that employment, provided that all of the following are true:

"(1) The peace officer is in his or her police uniform.

"(2) The casual or part-time employment as a private security guard or patrolman is approved by the county board of supervisors with jurisdiction over the principal employer or by the board's designee or by the city council with jurisdiction over the principal employer or by the council's designee.

"(3) The wearing of uniforms and equipment is approved by the principal employer.

"(4) The peace officer is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code.

"Notwithstanding the above provisions, a peace officer while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency shall not exercise the powers of a police officer if employed by a private employer as a security guard during a strike, lockout, picketing, or other physical demonstration of a labor dispute at the site of the strike, lockout, picketing, or other physical demonstration of a labor dispute. The issue of whether or not casual or part-time employment as a private security guard or patrolman pursuant to this subdivision is to be approved shall not be a subject for collective bargaining. Any and all civil and criminal liability arising out of the secondary employment of any peace officer pursuant to this subdivision shall be borne by the officer's principal employer. The principal employer may require the secondary employer to enter into an indemnity agreement as a condition of approving casual or part-time employment pursuant to this subdivision.

"It is the intent of the Legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers

who are employed, on a part-time or casual basis, while wearing a police uniform approved by the principal employer, as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment."

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No. 98-431

In The

Supreme Court of the United States

October Term, 1998

ADAN MELENDEZ AND ROSE MELENDEZ,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondent City of Los Angeles does not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

At all times relevant to this case, California Penal Code section 70, subdivisions (a) and (d), read as follows:

> "(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.
>
> . . . .
>
> (d) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer, and exercising the powers of a peace officer concurrently with that employment, provided that all of the following are true:
>
> (1) The peace officer is in his or her police uniform.

(2) The casual or part-time employment as a private security guard or patrolman is approved by the county board of supervisors with jurisdiction over the principal employer or by the board's designee or by the city council with jurisdiction over the principal employer or by the council's designee.

(3) The wearing of uniforms and equipment is approved by the principal employer.

(4) The peace officer is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code.

Notwithstanding the above provisions, a peace officer while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency shall not exercise the powers of a police officer if employed by a private employer as a security guard during a strike, lockout, picketing, or other physical demonstration of a labor dispute at the site of the strike, lockout, picketing, or other physical demonstration of a labor dispute. The issue of whether or not casual or part-time employment as a private security guard or patrolman pursuant to this subdivision is to be approved shall not be a subject for collective bargaining. Any and all civil and criminal liability arising out of the secondary employment of any peace officer pursuant to this subdivision shall be borne by the officer's principal employer. The principal employer may require the secondary employer

to enter into an indemnity agreement as a condition of approving casual or part-time employment pursuant to this subdivision.

It is the intent of the legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform approved by the principal employer, as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment."[1]

STATEMENT OF THE CASE

Respondent City of Los Angeles respectfully submits that the published opinion of the California Court of Appeal contains an accurate description of the proceedings below. Pet. App. 1-5. However, because petitioners have discussed the facts and legal proceedings at length, but not always correctly, the City will provide a brief overview of the case. This overview will highlight the inaccuracies in petitioners' account and also show that

[1] Stats. 1997, c. 452, deleted the phrase "and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code" at the end of the first paragraph of the statute, and substituted "shall" for "may" following "principal employer" in the fourth sentence of the second paragraph. Neither change affects the analysis in the present case.

the petition is misleading regarding the grounds on which the Court of Appeal reversed judgment on the only federal claim presented to the jury.

A. Procedural Facts.

This case arose when Thomas Burris and Stephen Oskierko, two off-duty Los Angeles Police Department ("LAPD") officers working as security guards, injured petitioner Adan Melendez. Pet. App. 1. Melendez and his wife Rosa subsequently sued Burris, Oskierko and the City of Los Angeles ("City") under both state and federal law. The case went to the jury against all defendants on Adan Melendez' state law battery and negligence claims, and his wife's loss of consortium claim, which was based on Melendez' battery and negligence claims. Pet. App. 5; Reporter's Transcript ("RT") 2091:4-16; Appellant's Appendix ("AA") 178. The case also went to the jury on Adan Melendez' federal law claim brought pursuant to 42 U.S.C. section 1983 ("section 1983"). Pet. App. 5.

The jury found for Adan Melendez on his state claims and on his federal law claim. As reduced to judgment, his award was $9,250,000 less a good faith settlement of $550,000 for a total of $8,700,000. Pet. App. 5. The jury also found for Rosa Melendez on her loss of consortium claim, awarding her $750,000 against the City and Burris, and $750,000 against the City and Oskierko. Pet. App. 5. The City appealed. Pet. App. 5.

The California Court of Appeal reversed with directions to enter judgment in favor of the City. Pet. App. 24. The court held that Adan Melendez' state law claims were precluded by California Penal Code section 70(d)

("section 70(d)") which provides that off-duty officers working as private security guards cannot exercise peace officer powers unless they comply with certain conditions, including wearing a uniform and securing their principal employer's permission to work the assignment. Pet. App. 16. The Court of Appeal found, and petitioners do not dispute, that Burris and Oskierko did not comply with these conditions. Pet. App. 18-19; Pet. 18, n.5. For this reason, the Court of Appeal held that neither man was acting as a peace officer when Melendez was injured. Pet. App. 18-19. Therefore, the City could not be held liable on a state law respondeat superior or direct negligence theory. Pet. App. 19-20.[2]

The Court of Appeal also reversed the jury verdict on Adan Melendez' section 1983 claim. The court did so for two wholly independent reasons, stating:

> "The injury suffered by respondents did not flow from any state policy or custom. *Nor was there a state actor whose actions triggered the statute.* Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala restaurant." Pet. App. 23, emphasis added.

Significantly, petitioners misquote this passage by omitting the italicized sentence without even providing

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[2] Because Rosa Melendez' state law loss of consortium claim derived from Adan Melendez' now-defunct state law claims, which cannot be and are not a subject of this petition, she is not a proper petitioner.

ellipses. Pet. 19.[3] By doing so, petitioners evidently hope to mislead this Court into believing that the Court of Appeal found causation lacking because Burris and Oskierko were not acting under color of law. As the full quotation shows, however, the court held there was no causation for the completely different reason that Melendez' shooting "did not flow from any state policy or custom." Pet. App. 23. As will be discussed below, the existence of this independent ground for the court of Appeal's decision on Melendez' section 1983 claim in and of itself requires that this petition be denied.

B. Substantive Facts.

Thomas Burris and Stephen Oskierko were LAPD officers. On the night of the incident that gave rise to this case, they were off duty and working a private security job. Pet. App. 2-3. LAPD officers are required to obtain their commanding officer's approval for outside employment "each time the nature or location of the work to be performed changes." AA 686. The commanding officer must certify that an investigation has shown "the employment is not of the prohibited type . . . " *Id.* Neither officer had secured the LAPD's permission to work this job and neither officer was in uniform. Pet. App. 3.

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[3] Petitioners quote the passage as follows: "The injury suffered by respondents did not flow from any state policy or custom. *Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala Restaurant.*" Pet. 19.

The private security job involved protecting the proceeds of an underground party organized by Laslo Borzai. Pet. App. 2-3. Such illegal gatherings are "set up somewhere in downtown L.A.," "they serve alcohol to anybody," and "just about anything goes." RT 229:17-24 and 434:24-433:4. The admission charge to this party was $20.00 per person. Pet. App. 2.

Borzai rented the Gala Restaurant, owned by the Tassop Family Trust, to serve as the location where tickets would be sold. Pet. App. 2. The restaurant was open only for that purpose. RT 592:7-593:5. The restaurant manager, Tassop, had been told to keep the place open until 12:30 or 1:00 a.m. Pet. App. 22. The restaurant opened for ticket sales at about 9:00 p.m., and sales began shortly thereafter. A table was set up at an entrance to the restaurant, facing a parking area. Customers approached the table to buy tickets. Two young women sold the tickets. Pet. App. 2.

Adan Melendez, along with some friends, purchased tickets at the Gala and went to the party. When they arrived, the party was being broken up by police. They turned around and went back to the restaurant to obtain refunds. Pet. App. 3. When they arrived there, at about midnight, tickets were still being sold. Pet. App. 22. People wanted their money back, but the ticket sellers, one of whom was gripping a cash box, refused to provide refunds. Pet. App. 3, 22; RT 362:1-2 and 362:26-28.

Burris and Oskierko were still acting as security guards at this time even if their only assignment was to

"guard the money." Pet. App. 22.[4] Each was armed with an LAPD-approved pistol and each had his official badge attached to his belt. Pet. App. 3. Burris was wearing his badge in such a manner that it was not apparent until he swept his jacket back. Augmentation to Reporter's Transcript ("AUG") 96:3-5. Instead of an LAPD uniform, each man wore casual clothes and a blue nylon jacket on which the word Security was printed in large white letters, front and back. Pet. App. 3. Burris and Oskierko had been drinking, and each had a sufficiently high blood alcohol level to be presumed under the influence at the time the incident giving rise to plaintiffs' action occurred. RT 1017:11 to 22; 1018:24 to 1019:10; California Vehicle Code, section 23155.

Burris and Oskierko approached the entrance area, telling the people to be on their way. Pet. App. 3. However, people in the crowd said, "They're security guards,

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[4] Petitioners assert that Burris and Oskierko had "no other work to do" after they escorted a courier off-premises with money collected before midnight. Pet. 9. As the Court of Appeal's opinion demonstrates, this contention is incorrect because tickets were still being sold after that time, so Burris and Oskierko were still fulfilling their function as security guards, which was to guard the money. Contrary to other assertions made by petitioners (Pet. 10), there was a line of ticket buyers in the parking lot, as well as a cash box on the premises. RT 188:26-189:29, 360:23-361:1, 362:1-2, 362:26-28, 615:8-25. Thus, even if tickets were not being sold at the precise moment Melendez was shot, the premises contained money Burris and Oskierko had been hired to protect, so plaintiffs are simply wrong in asserting that a "significant amount of time . . . elapsed between Burris' and Oskierko's last services as private security guards and the time Melendez was shot." Pet. 11.

they can't do shit." RT 1522:8-9. Oskierko and Burris identified themselves as police officers, and Burris swept back his jacket displaying his badge and gun. But the group of customers kept pressing forward, some yelling that the two were only security officers, not police. Oskierko drew his weapon and fired several shots at the ceiling. Pet. App. 3-4. After firing his weapon, Oskierko pointed his gun at the crowd and said, "Stay the fuck back. Get the fuck back." RT 453:1-7. Someone said the shots were blanks, and Oskierko then fired a round into the overturned table or into the floor. Pet. App. 4. The crowd initially stepped back, then Hogan and several other people, including Melendez, entered the restaurant. RT 457:24 to 458:11; 460:26 to 461:1; 927:11-20. Oskierko and Burris retreated. RT 458:14-27. Melendez approached Oskierko, who kicked at Melendez, making contact with his forearms. RT 768:1 to 769:14. Right after the kick, Burris shot Melendez, rendering him a paraplegic. RT 64:13-19; 772:7-13; 1192:8-11. The confrontation and shooting occurred shortly after midnight. AUG 85:21 to 86:4; RT 567:7-15. After the shooting, Burris handcuffed Melendez. Pet. App. 4.[5]

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[5] Petitioners assert that "[t]he LAPD sought felony charges against Melendez. . . . " Pet. 13. However, nothing in the record supports this statement. The Los Angeles County District Attorney's Office filed charges against Melendez (AA 685), but that office is an agency of the state. *Pitts v. County of Kern*, 17 Cal.4th 340, 345 (1998) ("The district attorney represents the state . . . when preparing to prosecute and when prosecuting crimes.")

REASONS FOR DENYING THE WRIT

This writ should be denied because petitioners' issues do not meet the threshold criteria for certiorari, and petitioners are wrong on the merits.

A. The Court of Appeal's Finding That Causation was Lacking as a Matter of Law Does not Meet the Threshold Criteria for Granting Certiorari; Moreover the Court was Right on the Merits.

As noted above, the Court of Appeal had two wholly independent grounds for reversing judgment on Adan Melendez' federal claim.[6] One reason was that there was no "state actor whose actions triggered the statute." Pet. App. 23. The other was that "[t]he injury suffered by respondents did not flow from any state policy or custom." *Id.* As the court explained, a government entity cannot be held liable

> " . . . solely because it employs an errant officer; '[i]nstead, it is when execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, *inflicts the injury* that the government as an entity is responsible under section 1983.' " Pet. App. 23, emphasis added.

In short, the Court of Appeal concluded that causation was lacking even if Burris and Oskierko had been acting under color of law. Questions concerning the persuasiveness and substantiality of the evidence do not

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[6] As also noted above, Rosa Melendez had no federal cause of action.

constitute an "important federal question" justifying this Court's review on certiorari. *Donaldson v. United States*, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971). For this reason alone, the issue is unworthy of review.

Moreover, the Court of Appeal was correct on the merits. In order to recover on a section 1983 lawsuit against a municipal entity, there must be a "direct causal link between" a City policy, custom or practice and plaintiff's injuries. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). The policy must be the "moving force behind the constitutional violation" and "closely related to the ultimate injury." *Id.* at 489 U.S. pp. 389, 391 [109 S.Ct. at pp. 1205, 1206, internal brackets and quotation marks omitted]. As in *City of Canton, Ohio*, plaintiffs here were required to demonstrate that their injuries would "have been avoided" had it not been for the allegedly deficient policy, custom or practice. Cf. *id.* at 489 U.S. p. 391 [109 S.Ct. at p. 1206].

Plaintiffs failed to make such a showing. Plaintiffs adduced evidence that the City had a custom or practice of condoning the use of excessive force and failing to discipline officers. However, plaintiffs adduced *no* evidence that a change in this policy would have affected Burris and Oskierko's decisions to work in violation of departmental regulations, ingest significant quantities of alcohol and use deadly force without *any* justification. Given these circumstances, no jury could have reasonably concluded that Burris' and Oskierko's conduct was "closely related" to an LAPD practice of tolerating excessive force. The conclusion of the California Court of Appeal neither abrogates nor ignores federal law, since

causation in federal civil rights cases may also be decided as a matter of law if insufficient evidence is presented to justify submission to the jury. See, e.g., *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) [peace officer's "considerable disciplinary record" of complaints for "excessive and improper force and unwarranted violence in arrest and detention" did not as a matter of law "establish the necessary causal link between the [public entity's] policy and [plaintiffs'] injuries" incurred as a result of the officer's "free-lance criminal" behavior].

Recognizing, perhaps, the weakness of their request for certiorari because of this independent state ground upon which the decision below was based, petitioners compare their case to this Court's recent decision in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). They argue that this case is comparable with *Board of County Commissioners* (which respondent does not concede), and assert that certiorari should be granted in order to "explain" the latter case and reconcile any differences between the majority and dissenting opinions. Pet. 28. But *Board of County Commissioners* is a case about the quantum of evidence necessary to show deliberate indifference, not causation, and bears little or no resemblance to this case. No "clarification" in *Board of County Commissioners* (even if such were necessary) would thus result

from the analysis proposed by petitioners and certiorari is inappropriate.[7]

Contrary to petitioner's assertion (Pet. 25-28), this case is not comparable to *Board of County Commissioners*. The question addressed in *Board of County Commissioners* was "whether the county was properly held liable for [plaintiff's] injuries based on the [policy maker's] single decision to hire [the peace officer who injured plaintiff]." *Id.* at 117 S.Ct. p. 1387. The entire focus of the case was on the degree of culpability necessary to hold the public entity liable, and the Court concluded that deliberate indifference would be found only if the "plainly obvious consequence" of the alleged unconstitutional policy, custom or practice would be the deprivation of a third party's federally protected right. *Id.* at 117 S.Ct. p. 1392.

In contrast, the question in the case at bar is whether respondent could be held liable for a policy, custom or practice of allowing or condoning the use of excessive force by police officers (and specifically by Burris), when that policy was not, as a matter of law, the cause of

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[7] Petitioners also contend that this case is an "appropriate vehicle to re-examine the question whether liability may or should be imposed upon a municipality based upon principles of vicarious or respondeat superior liability,. . . . " Pet. 29. Such an examination would be pointless in the context of this case, however, since petitioner would lose even if this Court were to overrule *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) on this issue. Since Burris and Oskierko were not "state actors" at the time of the shooting, there is no civil rights violation extant for which respondent could be found vicariously liable.

plaintiff's injuries. Tolerating excessive force is not equivalent to tolerating peace officers working in violation of department regulations, ingesting significant quantities of alcohol and using deadly force without any justification. Correcting the claimed "deficiencies" in the LAPD's practices regarding excessive force would not have resulted in Burris and Oskierko refraining from working illegally, becoming intoxicated and using deadly force without any justification, all acts which were obviously flagrantly improper. (Cf. *Harlee v. Hagen*, 538 F.Supp. 389, 397 (E.D.N.Y. 1982) [court notes that "[b]eating an individual with a revolver is rarely, if ever, an appropriate act by an officer" in rejecting *Monell* claim based on failure to train, supervise or discipline]. See also *Kasarda v. Tomasch*, 530 F.Supp. 1346, 1347-1348 (N.D. Ohio 1982) [no *Monell* liability for off-duty peace officer's actions as a security guard because city did not supervise this employment, so there was "no causal connection between the alleged policy of the city and the injuries sustained by the plaintiff"].)

In short, this is not the case to support a re-examination of the deliberate indifference issues addressed in *Board of County Commissioners of Bryan County, Oklahoma v. Brown, supra*. Absent any causative link between the policy of allowing or condoning the use of excessive force and the injuries sustained in this case, respondent's alleged deliberate indifference to the constitutional violations caused by the use of excessive force is irrelevant. Certiorari is therefore not warranted and the petition should be denied.

B. The Court of Appeal's Determination that Burris and Oskierko did not Act Under the Color of Law was Correct and Does not Conflict with Federal or State Law.

Petitioner argues that the Court of Appeal has "eviscerated" the federal "color of law" provision in section 1983 (Pet. 21) by holding that the police officers in this case were not state actors because neither was "acting as a peace officer nor in any other public capacity in connection with the events of the Gala Restaurant." Pet. App. 23. Whether a person is a "state actor" involves the same "ultimate issue" as whether they acted under "color of state law" within the meaning of section 1983. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982). The issue presented by this holding is not worthy of a grant of certiorari, however, because at most, the Court of Appeal misapplied existing law. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994). Moreover, it is clear that state authority is a requisite to state action under section 1983 and the Court of Appeal's opinion was thus correct on the merits.

As this Court has noted, a person acts under color of state law when he or she "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is *clothed with the authority of state law.*' " *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988), emphasis added. Thus, "a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *Id.* at 49-50 [108 S.Ct. at 2255].

Because Burris and Oskierko did not comply with Penal Code section 70, subdivision (d), they did not "exercis[e] the powers of a peace officer concurrently" when they were employed as private security guards at the Gala Restaurant. Under state law, they had no police authority, but could act simply on behalf of their private employer as a private citizen. Thus, they could not have "exercised power 'possessed only by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West*, 487 U.S. at 49, 108 S.Ct. at 2255. Nor could they have been "abus[ing] the position given to [them] by the state." *Id.* at 49-50, 108 S.Ct. 2255. Once they failed to comply with section 70, subdivision (d), they had no position conferred by state law; they were simply private actors. Burris and Oskierko could not have acted under the color of law and respondent could not be held liable under section 1983.

Although petitioner contends that the Court of Appeal's opinion conflicts with federal decisional authority (Pet. 21), the cases upon which petitioner relies define "color of law" in a manner perfectly consonant with the Court of Appeal's holding. In *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941), this Court defined the phrase "color of law" as follows: "Misuse of power, possessed by *virtue of state law* and made possible only because the wrongdoer is *clothed with the authority* of state law, is action taken 'under color of state law.' " (Emphasis added.) Burris and Oskierko could not possess power "by virtue of state law" because they were not "clothed with the authority of state law." Section 70 had stripped them of that authority during the time they were employed as private security guards.

The actual authority which Burris and Oskierko possessed while acting as private security guards was no greater than that of any two security guards not employed by the LAPD. This Court has made it clear that a police officer who *exceeds* his authority by performing an illegal act can be deemed to act under color of law, he cannot act under color of law if he has *no* authority to act as a peace officer. The Court enunciated this distinction in holding that state police officers who had beaten a man to death while arresting him acted under the color of law though they exceeded their authority. The Court observed:

> *"We are not dealing here with a case where an officer not authorized to act* nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective." *Screws v. United States*, 325 U.S. 91, 92, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495 (1945), emphasis added.

See also *Griffin v. State of Maryland*, 378 U.S. 130, 135, 84 S.Ct. 1770, 1773, 12 L.Ed.2d 754 (1964) ["if an individual *is possessed of state authority* and purports to act under that authority, his action is state action." Emphasis added].

Neither does the Court of Appeal's opinion "eviscerate" the federal jury instruction definition of "color of law." (Pet. 22.) This instruction states, in pertinent part:

> "In order for unlawful acts of an official to be done 'under color of any law,' however, the unlawful acts must be done while the official is

> purporting or pretending to act in the performance of his official duties; *that is to say*, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official *only* because he is an official. . . . " Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions (4th ed. 1987) § 103.04, p. 947, emphasis added.

Petitioner emphasizes the phrase "purporting or pretending to act in the performance of his official duties" while ignoring the fact that the instruction defines such "purporting and pretending" as an abuse of power which is possessed by the "official only because he is an official. . . . " In the present case, section 70 prohibited Burris and Oskierko from acting as officials, so there was no power to "purport or pretend" to misuse.

The Court of Appeal was correct on the merits. Moreover, even if it was not, the most that can be said is that the court misapplied settled law, and this is not a ground for certiorari. The cases cited by petitioner in support of his contention that the opinion is inconsistent with the federal definition of "color of law" are not in fact conflicting. Certiorari is therefore inappropriate and should be denied.

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CONCLUSION

For all of the above reasons, the petition for certiorari should be denied.

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Respectfully submitted,

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